GOH WUI LEE, RE: EX P; STANDARD CHARTERED BANK

HIGH COURT BORNEO, KOTA KINABALU
HAIDAR MOHD. NOOR J
[HIGH COURT SUIT NO. K 437 OF 1983]
10 SEPTEMBER 1990

CIVIL PROCEDURE: *Bankruptcy notice - Mistake in date of judgment in particulars of claim - Whether formal defect or irregularity - Invalidation - Greater amount in judgment - Grounds for setting aside - Second bankruptcy notice in relation to same debt.*

The creditor SCB, obtained final default judgment against the debtor G on 4 July 1985 for an amount of approximately RM2.7 million. On 25 November 1989, SCB served a bankruptcy notice on G. G commenced proceedings for the setting aside of this bankruptcy notice on the grounds of invalidity as a result of firstly a mistake in the notice of the date of judgment, secondly that the judgment of 4 July 1985 was for a sum larger than what was owing and thirdly that as there was a pending bankruptcy proceeding by SCB against G for the same matter (which G had applied to set aside) the present bankruptcy proceedings was an abuse of process of Court.

Held:

[1] Under the prescribed Form 5 in the schedule to the Bankruptcy Rules 1969 (the Rules), there is no requirement for insertion of "particulars of claim"; since the typing error in respect of the year is in "the particulars of claim" which do not form part of the prescribed form of the bankruptcy notice to be issued, such error could not invalidate the bankruptcy notice.

[2] (a) The bankruptcy notice has clearly referred to the judgment dated 4 July 1985; although the particulars of claim state the judgment date as 4 July 1983 G was not reasonably misled, as is evidenced by G's affidavit.

(b) Such a defect is only a formal one and therefore it is validated by s. 131 of the Bankruptcy Act 1967.

[3] (a) It is clear the judgment obtained on 4 July 1985 was for a greater sum as it is clear from the particulars of claim that a payment of RM2.43 million was made by G and received by SCB on 28 January 1985.

(b) The judgment obtained by SCB on 4 July 1985 is an irregularity which can be set aside; however G has not applied to do so.

(c) As there is no evidence of fraud, collusion or miscarriage of justice, the Court cannot inquire into the validity of the judgment.

[4] The debtor cannot succeed in setting aside the present bankruptcy notice as the case law shows that a creditor can issue a second notice in respect of the same debt.

[G's notice of motion dismissed.]

Cases referred to:

Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 MLJ 236
Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ (Rep) 277
Isaacs v. Robertson [1984] 3 All ER 140
Muir v. Jenks & Co. [1913] 2 KB 412
Ghazali bin Mat Noor v. Southern Bank Berhad [1989] 1 CLJ (Rep) 35
In re Fredericke & Whitworth, ex parte Hibbard [1929] 1 Ch

Legislation referred to:
Bankruptcy Act 1967, s. 131
Bankruptcy Act 1914 [UK], s. 147(1)

Other sources referred to:
Williams on Bankruptcy, 18th Edn., at p. 41
White Book 1979 at p. 129

For the petitioning Creditors - P. Phang; M/s. Reddi & Co. A dvocates
For the Debtor - Paul Tang; M/s. Ibrahim & Co.

JUDGMENT

Haidar Mohd. Noor J:

The debtor, Goh Wui Lee filed a notice of motion on 15 January 1990 (encl. 5) and prays for the following reliefs:

(a) that the bankruptcy notice taken out and served on the debtor by the creditors dated 25 November 1989 be set aside;

(b) that this Honourable Court makes a declaration that no act of bankruptcy has been committed by the debtor under the said notice;

(c) costs;

(d) any other reliefs this Honourable Court deems fit and just.

The debtor filed an affidavit dated 15 January 1990 in support of the motion.

The grounds relied on by the debtor can be summarised as follows:

(i) the bankruptcy notice is invalid as it is defective in that the particulars of the claim in the said notice described the judgment as dated 4 July 1983 instead of 4 July 1985 and claims that this judgment is a non-existing judgment and in any event does not follow the terms of the judgment dated 4 July 1985.

(ii) the bankruptcy notice is invalid as it is based on a judgment which is bad in law as the judgment dated 4 July 1985 is entered for a sum which is larger than what was owing;

(iii) the present bankruptcy proceeding is a proceeding in abuse of the process of this Court as there is a pending bankruptcy proceeding by the creditors against the debtor for the same matter in the Kota Kinabalu High Court and that she has applied to set aside the bankruptcy notice (Exhibit "GWL3").

Ground (i)

In the bankruptcy notice ("GWL1") issued in this case, it clearly requested the debtor to pay the creditor the sum of RM840,410.75 inclusive of interest calculated up to 22 November 1989 claimed by the creditor as being the balance of the amount due on a final judgment obtained by them against the debtor in the High Court, Kota Kinabalu Suit No. K. 437 of 1983 dated 4 July *1985*. It seems obvious to me that the judgment referred to in the said bankruptcy notice is 4 July *1985* though in "the particulars of claim" it would appear that the date of the judgment was stated as "4 July *1983*". On the face of "GWL1" it is clear that there was a typing error in the year which should read "1985" instead of "1983" as in "the particulars of claim".

Now, a bankruptcy notice is issued pursuant to r. 91(1) of the Bankruptcy Rules 1969 ("the Rules") and it is to be issued in accordance to the prescribed form 5 in the schedule to the Rules. Looking at the prescribed form 5, to my mind, there is no requirement for "particulars of claim" to be inserted therein. Since the typing error in respect of the year is in "the particulars of claim" which do not form part of the prescribed form of the bankruptcy notice to be issued then, in my view, such error could not invalidate the bankruptcy notice. The bankruptcy notice here with the correct year specified therein would appear in the circumstances to be proper and in accordance to the prescribed form and there is perhaps no necessity for the Court to invoke s. 131 of the Bankruptcy Act 1967 ("the Act") in this case.

Be that as it may, can it be said that the error 4 July *1983* instead of 4 July *1985* to be a mere formal defect and that no injustice has been caused to the debtor by that defect and hence the bankruptcy proceeding shall not be invalidated. In this respect s. 131 of the Act provides:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

The words "formal defect or irregularity" as in s. 131 of the Act (previously s. 131 of the Bankruptcy Ordinance 1959) are identical in s. 147(1) of the English Bankruptcy Act 1914 and were considered by the Privy Council in *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ at p. 236 where Lord Diplock delivering the judgment of the Board said:

> But there is relevant authority upon the construction of the identical words in s. 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a "formal defect or irregularity." It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
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> What, then, is a "formal defect or irregularity" within the meaning of the section?. This was discussed in relation to a bankruptcy notice *In re A Debtor* (No. 21 of 1950), *Ex parte the Debtor v. Bowmaker Ltd.* [1951] Ch 313, in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If, on the other hand, it could not reasonably mislead the debtor it was a formal defect and validated by the section. Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a "formal defect" and invalidated by the section.

In this case the bankruptcy notice (encl. 3) has clearly referred to the judgment dated 4 July 1985 obtained against the debtor by the creditor in High Court in Borneo at Kota Kinabalu Suit No. K. 437 of 1983. Although the particulars of claim stated the year of judgment as 1983, was the debtor reasonably mislead? I do not think so as in the debtor's own affidavit at para. 3, she stated:

> ...no judgment was obtained against me dated 4 July 1983. The judgment obtained against me by the creditors in Suit No. K.437 of 1983 was dated 4 July 1985.

The debtor even exhibited a copy of the judgment obtained against her as "GWL2".

As I am of the view that such a defect is only a formal one and therefore it is validated by s. 131 of the Act and hence the debtor fails on this ground to set aside the bankruptcy notice on her.

Ground (ii)

I think it is not disputed that the judgment sum of RM2,716,632.45 obtained by default *vide* Kota Kinabalu Suit No. K.437 of 1983 on 4 July 1985 was for a greater sum as it seems clear from the particulars of claim that a payment of RM2.43 million was made by the debtor and received by the creditors on 28 January 1985. It would appear equally clear also that the interest charged at the rate of 9% per annum was based on the sum of RM2,716,632.45 up to 27 January 1985 as the payment of RM2.43 million was made on 28 January 1985 and not up to the date of the judgment i.e. 4 July 1985. Therefore the interest charged here is in order and the debtor was not overcharged.

Be that as it may, can the debtor succeed to set aside the bankruptcy notice on the ground that the judgment sum was entered for more than what was actually owing? In this respect, the Supreme Court case of *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ (Rep) 277 may be relevant where at p. 279, Lee Hun Hoe CJ (Borneo) said:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned Judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the Court could not go behind the judgment. See *In re Easton* [1893] 10 Mor. 111; 9 TLR 409.

In the later part of the judgment His Lordship said:

> An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp* [1904] 1 KB 572. As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau* [1889] 22 QBD 83; *Re Howell* [1915] 84 LJKB 1399.

Going by what was stated by Lord Diplock in *Isaacs v. Robertson* [1984] 3 All ER 140, 143, it would appear in my view, that the judgment obtained by the creditor in this case is an irregularity which can be set aside by the Court that made it on application to that Court. As at present advised, the debtor has not yet obtained the setting aside of that judgment and as such it is no sufficient reason for going behind the judgment. It appears that the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice. In my view in this case there is no evidence of fraud or collusion or miscarriage of justice or for that matter allegations of any such matters by the debtor. The argument put forth by Mr. Paul Tang, Counsel for the debtor, I must say, is very attractive and appears to be convincing. However the passage relied on by him at p. 129 of the *White Book* 1979 under the heading "Judgment entered for too much" I would say that on a close reading of the case of *Muir v. Jenks & Co.* [1913] 2 KB 412, CA it would appear that the Court of Appeal dealt principally on the issue of setting aside the judgment entered for too much and the Court of Appeal did not hold that "bankruptcy proceedings taken on such a judgment are bad even though the bankruptcy notice was issued for the correct amount". Further, our Supreme Court clearly sets out the general principle on the grounds for the Court to inquire into the validity of the judgment in *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee*, *supra*, at p. 305 as follows:

> As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice.

This ground, I regret to say, fails.

Ground (iii)

It is not disputed that there is a pending bankruptcy proceedings by the creditors against the debtor in Kota Kinabalu High Court in respect of the same matter. Therefore the debtor alleged that the present bankruptcy notice is a proceeding in abuse of the process of the Court and hence there is a duplicity of proceedings.

According to the affidavit in opposition filed by the creditor through the solicitor in Kota Kinabalu, one Norbart Yapp, it is deposed at para. 6 that the creditor had given instructions to withdraw the petition in view of the decision of the Supreme Court in *Ghazali bin Mat Noor v. Southern Bank Berhad* [1989] 1 CLJ (Rep) 35 where the failure to quantify the interest charges would render a bankruptcy notice invalid *ab initio* and which is the case in respect of the bankruptcy proceedings in Kota Kinabalu High Court and presently pending and waiting for the date of hearing for the petition to be withdrawn. The present bankruptcy notice would not in any event appear to be a duplicity.

In any event, in respect of a second notice, *Williams on Bankruptcy*, 18 Edn., at p. 41 said:

> Second notice
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> A creditor who has served a notice which has not been complied with may issue and serve a second notice for the ***same debt,*** and the existence of the pre-existing available act of bankruptcy does not excuse the debtor from compliance therewith. A second notice may also be issued in respect of a debt where the first is withdrawn, and there is a balance due and no stay of execution. (Emphasis added)

I need further only to quote the headnote of the case of *In re Fredericke & Whitworth, ex parte Hibbard* [1929] 1 Ch, in respect of the issuance of a second bankruptcy notice where it is stated at p. 253:

> Where a petitioning creditor had issued and served upon a debtor a bankruptcy notice which has not been complied with he is not thereby precluded from issuing and serving a second bankruptcy notice upon the debtor in respect of the ***same debt;*** and the debtor is not entitled to excuse himself from compliance with the second notice on the ground that there is no existing available act of bankruptcy under the first notice. (Emphasis added)

It therefore seems clear, in my view, that the debtor cannot succeed on this ground to set aside the present bankruptcy notice.

On the given facts, authorities and the law, I would dismiss the notice of motion with costs.

Also found at [1991] 1 CLJ 170